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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE LAMONT WEEMS,

Defendant and Appellant.

E030804

(Super.Ct.No. FBA6134)

OPINION

APPEAL from the Superior Court of San Bernardino County. Thomas D. Glasser, Judge. Reversed and remanded.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J.T. Carlton, Supervising Deputy Attorney General, and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals from his convictions for two counts of second degree robbery (Pen. Code, § 211)¹ and two counts of aggravated kidnapping for robbery (§ 209, subd. (b)(1)), all with enhancements for personal use of a firearm (§§ 12022.5, subd. (a) & 12022.53, subd. (b)), and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). Defendant argues that (1) there was insufficient movement of the robbery victims to support the aggravated kidnapping convictions, and (2) the restitution fine for the unrecovered stolen jewelry should have been based on the jewelry's wholesale cost not its retail value. We agree, reverse the aggravated kidnapping convictions and the restitution award, and remand for resentencing.

STATEMENT OF FACTS

On the day in question, Banks and Potter were both working as sales associates at a jewelry store in an outlet mall. Shortly after they had opened the store, defendant and two other men entered the store and announced that this was a robbery. All three had masks, gloves, and guns. At that time, Banks was seated near the back of the store and Potter was talking on the telephone near a cash register in the middle of the store. The robbers threatened Potter and Banks with the guns and forced them into a back room that was not visible to the public.

Once they were all in the back room, the robbers asked for loose diamonds, but Potter explained that the store was too small to have loose diamonds. The robbers then

¹ All further statutory references will be to the Penal Code.

forced Potter to open one of the four safes that were located in the back room. After that, the robbers forced Potter to lie down on the floor and bound her with duct tape.

In the meantime, one of the robbers forced Banks to go back out to the display area and fill a bag with diamond jewelry. After returning to the back room with the diamond jewelry, Banks began crying and hyperventilating. One of the robbers assured Banks that they would not hurt her and then sent her back out again to fill another bag with diamond jewelry. After filling the second bag, Banks returned to the back room, was ordered to lay down on the floor, and was also bound with duct tape.

Before leaving, one of the robbers dumped the contents of the open safe onto the floor and commented that it was all “junk.” The robbers then left, telling the victims not to move.

Following a court trial, defendant was convicted of two counts of second degree robbery (§ 211) and two counts of aggravated kidnapping for robbery (§ 209, subd. (b)(1)), all with enhancements for personal use of a firearm (§§ 12022.5, subd. (a) & 12022.53, subd. (b)), and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). Defendant was sentenced to two consecutive terms of life with the possibility of parole plus 10 years for the aggravated kidnapping counts and associated firearm use enhancements. Defendant was also sentenced to two concurrent years for being a felon in possession of a firearm. In regard to the robbery counts, defendant was sentenced to five years, plus 10 years for the firearm use enhancements, but those sentences were stayed pursuant to section 654. Additionally, because the stolen jewelry

was never recovered, defendant was ordered to pay \$545,000 in restitution to the jewelry store.

DISCUSSION

1. *Aggravated Kidnapping*

Aggravated kidnapping occurs whenever someone “kidnap or carries away any individual to commit robbery, rape,” or other specifically enumerated sexual offenses. (§ 209, subd. (b)(1).) However, aggravated kidnapping only occurs “if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” (§ 209, subd. (b)(2); see also *People v. Daniels* (1969) 71 Cal.2d 1119, 1139; *People v. Rayford* (1994) 9 Cal.4th 1, 20.)

Defendant argues that the movement of the jewelry store sales associates from the front of the store to the back room did not amount to an aggravated kidnapping because it was merely incidental to the robbery and did not increase the risk of harm inherent in the robbery. Based on this court’s recent decision in *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), we agree. In *Hoard*, this court confronted an analogous jewelry store robbery where the sales associates were forced into a back room. (*Id.* at p. 602.) The *Hoard* majority concluded that this type of movement did not amount to aggravated kidnapping because it was merely incidental to the robbery and did not

increase the risk of harm. (*Id.* at p. 607.) Thus, the issue is settled in this division of this district; the movement of the sales associates did not amount to aggravated kidnapping.²

2. *Restitution Fine*

During trial, the parties stipulated that the stolen jewelry had a cost value of \$138,000 and a retail value of \$545,000. Defendant argues that the trial court erred by basing the restitution fine on the retail value of the jewelry, rather than the cost value. We agree.³

Section 1202.4, subdivision (f)(3)(A) provides that a restitution award be designed to reimburse victims for “every determined economic loss . . . , including, but not limited to . . . the replacement cost of like property.” Although a trial court has considerable discretion in making a restitution award, it “must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.” (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992 (*Thygesen*).)

The restitution award based on the retail value of the jewelry was not reasonably calculated to make the jewelry store whole. It is undisputed that the stolen jewelry only cost the store \$138,000. Thus, if the store collected \$545,000 from defendant, it could

² This renders moot defendant’s argument that the robbery convictions must be reversed because they are a lesser included offense of aggravated kidnapping for robbery.

³ Although it appears that defendant waived this issue by failing to object below, we will address the merits in order to forestall defendant’s argument that trial counsel was ineffective for failing to object.

purchase four times as much jewelry on the wholesale market as was actually stolen and sell that jewelry at retail for four times as much as the original restitution award. This is a gratuitous windfall for the store, not a reimbursement for real economic losses.

Respondent relies on *Thygesen, supra*, 69 Cal.App.4th 988, to argue that the restitution award should include the lost revenue or lost profits that the stolen jewelry would have earned. *Thygesen* is easily distinguishable from the instant case. In *Thygesen*, the defendant stole a rented cement mixer and was required to pay restitution to the rental company based in part on the lost rental income that would have been earned from the mixer if it had been returned in a timely manner and been available for other renters. (*Id.* at pp. 990-991.) The *Thygesen* court approved the award for lost rental income, concluding that economic loss “may well include the loss of revenue the stolen item would have produced.” (*Id.* at p. 994.) However, in our case, there is no evidence that the jewelry store was renting the stolen jewelry. As a result, there is no evidence of lost rental income or any other lost revenue. The victim was, after all, merely a retail store. It can easily purchase replacement jewelry on the wholesale market and sell it for the same retail mark-up.

DISPOSITION

The convictions for aggravated kidnapping and the restitution award are reversed, and the case is remanded for resentencing.⁴

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/s/ McKinster
Acting P. J.

We concur:

/s/ Richli
J.

/s/ Ward
J.

⁴ The parties agree that the abstract of judgment improperly indicates that this was a jury trial when it was actually a court trial. This oversight can be corrected on remand.